Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Patricia Simon and John Simon,
Petitioners,

v.

The United States of America,
Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals For The First Circuit.

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

1. Does the 'Postal Matter' Exception from liability set forth in 28 U.S.C. Section 1346 (b)(1), bar a claim for the theft of a package which the Postal Service knew contained a decedent's cremated remains and which the Postal Employees stored in an area which they knew to be insecure?

2 Does conduct of the Postal Department which constitutes either 'wanton or willful misconduct' or 'gross negligence' render inapplicable the 'Postal Matter Exception' from liability set forth in 28 U.S.C. Section 1346 (b)(1)?

3 Does the 'Postal Matter' exception from liability set forth in 28 U.S.C. Section 1346 (b) (1) bar a claim for the theft of a package which the Postal Service knew contained a decedent's cremated remains and which the Postal Department stated was not insurable?

PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed appear in the caption. There is no parent or subsidiary company of any party.

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OPINION BELOW

The United States Court of Appeals for the First Circuit on September 11, 2009 issued its Judgment affirming the District Court's Allowance of the Motion to Dismiss for Failure to State a Claim filed by the United States of America and Dismissal of the Plaintiffs' action. (Appendix, 2a). The decision of the United States Court of Appeals for the First Circuit is unpublished.

JURISDICTION

On September 11, 2009, the United States Court of Appeals for the First Circuit entered its Judgment affirming the Order of Dismissal by the District Court. The United States Supreme Court has jurisdiction under 28 U.S.C. Section 1254 (a), to review cases in the Courts of Appeals by the grant of a writ of certiorari.

This Petition is grounded under two of the standards governing review of a Petition for Writ of Certiorari, promulgated under the following sections of Rule 10 of the Supreme Court Rules:

(1) under Section (a), a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals, and

(2) under Section (c), a United States Court of Appeals has decided an important question of federal law in a way the conflicts with relevant decisions of the United States Supreme Court.

STATUTORY PROVISION INVOLVED

The Petitioners bring this Petition as the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit dismissed the Petitioners' claim by applying 28 U.S.C. Section 2680 (b), the text of which is:

Section 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

STATEMENT

This case involves the extent to which the "Postal Matter" exclusion of Section 2680 (b), both in terms of the types of claim and the degree of culpable conduct of the Postal Employees resulting in the loss, as follows;: (1) Is a claim for the theft of a box which the Postal Employees knew contained cremated remains and which the Postal Employees nevertheless stored in an area which they knew to be insecure barred; by the exclusion; (2) Does conduct of the Postal Employees constituting either "wanton or willful misconduct" or "gross negligence" affect the exclusion's availability; and (3) Can the Exclusion bar a claim for loss resulting from the Postal Department's employees placed cremated remains which they knew to be uninsurable in a storage area which was insecure and from where the remains were foreseeably stolen?

I. THE FACTS

The Plaintiffs Patricia Simon and John Simon are the two children of the late Eileen Patricia Simon ("Eileen Simon"), who died on April 30, 2007 at Sturdy Memorial Hospital. Eileen Simon's immediate cause of death was a myocardial infarction. She was sixty-one.

Although Eileen Simon was a devout Catholic, her children could not afford a casket, so they arranged to have her cremated at a funeral home and to have her ashes then forwarded for burial with her father, mother and husband at Evergreen Cemetery, Brighton, Massachusetts. Her remains were forwarded for funeral purposes to the R.J. Ross Funeral Home in Wrentham, MA, which performed the services, cremated Eileen Simon's remains, and prepared the remains for shipment by United States Post Office Registered Mail to Evergreen Cemetery.

On May 17, 2007, Richard Ross, the proprietor of the funeral home, had Eileen Simon's remains stored in a box typical in size and shape for the shipment of cremated remains. He brought the box with the cremated remains to the Wrentham (Massachusetts) Post Office for mailing to Evergreen Cemetery. Richard Ross on many occasions had forwarded the ashes of deceased persons who chose to be cremated, and he generally used the Wrentham Post Office. When he would forward the ashes by mail from the Wrentham Post Office, the employees of the Post Office told him that the "safest" and "best" way to send the cremated remains was by registered mail. When he would ask the Postal employees as to how much to declare as the value, the Postal employees told him that the value was "inestimable" and that, "you can't insure sentiment." Richard Ross would therefore declare the value as,"0.00."

When Richard Ross arrived at the Post Office at approximately 4:11 p.m. on the afternoon of May 17, 2007 to mail Eileen Simon's remains for cremation, he was waited upon by a Postal Representative whom he knew by the name of, "David." He told the Postal Employee that the box contained cremated remains, and the employee took extra care in taping the box for Registered Mail Shipment and to tape thoroughly all the corners of the box. Richard Ross mailed the cremated remains by Registered Mail, at a cost of $16.15.

At the time of closing on May 17, 2007, the Postal Employees placed the box, knowing that it contained human remains, and the Post Office's remittance for the day, in the amount of $1,845.98, in the "loading area" for pick-up. The Postal Employees willingly and knowingly placed the remains in an area which was insecure, unlocked, and from which it was foreseeable that there would be either the theft or loss of the box containing the cremated remains of Eileen Simon.

At approximately 6:15 p.m., the highway contract driver employed by R&F Trucking, arrived at the Wrentham Post Office and discovered that the overhead door to the loading dock, located at the rear of the Post Office, was in the "up" position, and the platform used as loading dock was extended. The mail sack, containing remittance of $1,845.95, and the box containing Eileen Simon's remains was missing.

According to the Report of Incident by the United States Postal Service Office of the Inspector General, the box containing the remains of Eileen Simon was lost or stolen.

The Postal Inspectors contacted Richard Ross, and informed him of the alleged theft of Eileen Simon's remains. Richard Ross then discussed the loss of Eileen Simon's remains with an employee of the Post Office, by the name of Jean, who told him that the Post Office had been having problems with the locks of the door to the area where outgoing registered mail was kept, and she was not surprised that a theft had occurred.

The United States Office of the Inspector General assigned Special Agent Mark Nero to investigate the loss of Eileen Simon's ashes, and he met with Patricia Simon at the Attleboro Post Office. He informed Patricia Simon that her mother's ashes were stolen.

A few weeks later, the Post Office representatives contacted Patricia Simon and told her that they were sorry but that they could not locate the ashes and likely would not be able to do so.

On November 14, 2007, Patricia and John Simon, by their counsel, submitted a United States Postal Service Freedom of Information Act Request, asking for a copy of Special Agent Nero's Report, as well as all documents upon which he relied in preparing his report, and all

documents which in any way pertained or referred to the loss of Eileen Simon's ashes. The Report which was produced was substantially redacted, including redaction of substantial portions of the report concerning how Post Office employees secured the area where the remains were secured, and did not include the interviews with Post Office employees whom Special Agent Nero contacted. On January 31, 2008, the attorney for Patricia and John Simon filed an Appeal, and on February 12, 2008, Gladys C. Griffith, the Freedom of Information Act Officer, stated in her response, which continued to refuse to disclose information and documents,

> "...(5 U.S.C. Section 552) Exemption (b) (2) permits the withholding of records that are related solely to the internal personnel rules and practices of the agency. Certain facts relating to the location of the item before its loss were excised under Exemption (b)(2), as disclosure could expose the Postal Service property to additional loss..."

II. THE PETITIONERS' ACTION AND DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

On November 3, 2008, the Petitioners filed their action in the United States District Court for the District of Massachusetts (Boston). On January 8, 2009, the Defendant United States of America ('United States') filed a Motion to Dismiss Plaintiff's Complaint, on the ground that liability against the United States was excluded pursuant to 28 U.S.C. Section 2680 (b). On March 17, 2009, the District Court, Young, J., after hearing, granted the United States' Motion to Dismiss, and on the following day, March 18, 2009, entered an Order Dismissing the Case. (Appendix A).

On March 24, 2009, the Petitioners filed a Notice of Appeal. On September 11, 2009, the United States Court of Appeals for the First Circuit, without oral argument, entered its Judgment affirming the District Court's Order of Dismissal. The Judgment stated, in its first paragraph, that the District Court had dismissed the civil suit for failure to state a claim, because of the 'postal matters exception' set forth in 28 U.S.C. Section 2680 (b), and added, in the second paragraph,

> "Appellants urge that the exception should not apply in this case, because they were denied the option of buying insurance for the shipment of the ashes, and because the defendant's conduct was more than merely negligent, rising to the level of gross negligence. Neither contention is supported by law. The allusion to insurance in Dolan vs. U.S. Postal Service, 546 U.S. 481, 490 (2006) ('losses of the type for which immunity is retained under 2680 (b) are at least to some degree avoidable or compensable through postal registration or insurance') does not affirmatively condition the application of the postal matters exception on the availability of insurance. Appellants' gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere. Levasseur vs. U.S. Postal Service, 543 F. 3d 23 (1st Circ. 2008)."
>
> (Appendix, B).

REASONS FOR GRANTING THE PETITION

The Petitioners have alleged that they delivered a package containing their mother's cremated remains to the United States Postal Service, that they sent the package by Registered Mail, and that the Postal Service employee knew that the package contained cremated remains. As the package contained cremated remains, it was not insurable. The Postal Service employees willfully and knowingly placed the remains in an area which was insecure, unlocked, and from which it was foreseeable that there would be either the theft or loss of the cremated remains.

The dismissal of the Simon's Complaint reflects a fundamental dichotomy concerning the interpretation and application of the "Postal Matters" exclusion between decisions of the United States Supreme Court and the Circuit Courts. The United States Supreme Court, most recently in its decision of Dolan vs. United States, 546 U.S. 481 (2006), as well as decisions of the Second and Ninth Circuits, all consider the purpose of the postal matters' exception was to protect the United States from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the duties of the postal system, and therefore restrict the exclusion to bar only claims by which the loss resulted by no worse than negligent conduct. These Courts also interpret the 'postal matters' exclusion as only barring claims which were insurable. Conversely, the First Circuit Court of Appeals, most recently in its Judgment dismissing the Petitioner's claim, interprets the exception to bar claims for 'loss' or 'miscarriage' of the mail, even if occasioned by gross negligence, and also interprets the exclusion as barring claims for losses against which the injured party could not have purchased insurance.

I. CONGRESS' INTENT FOR ENACTING THE POSTAL MATTERS EXCEPTION.

The Petitioners' cause of action fundamentally raises the issue of Congressional intent when it established the "postal matters exception" set forth in 28 U.S.C. Section 2680 (b). The Second Circuit has cited the testimony of Abraham Holtzoff, Special Assistant to the Attorney General, before the Senate Subcommittee which considered the proposed legislation, that,

> "Every person who sends piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, it in any case of loss or delay the Government could be sued for damages. Consequently, this provision was inserted."
>
> Hearings on S. 2690 before a Subcomm. Of the Sente Comm. on the Judiciary, 76th Cong. 38 (1940). See Raila vs. United States of America, 355 F. 3d 118, 122 (2d Circ. 2004).

The District Court in the Second Circuit, in consideration of Special Assistant Attorney General Holtzoff's testimony, has observed that,

> "Congress was concerned with shielding the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year."
>
> Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978). See also Raila vs. United States of America, 355 F. 3d 118, 122 (2d Circ. 2004).

The Second Circuit affirmed this reasoning, stating, in a case of "negligent transmission," that the language of the exception itself indicates that it was not aimed to encompass intentional acts, but only negligent omissions, and that on the facts of the case, the letters were not lost or miscarried, so as to exclude the claim based on the exclusion's reference to "loss" or "miscarriage "Upon appeal, the Second Circuit Court of Appeals reversed so much of the District Court decision as ordered the Postal Department to write letter of apology, as the Federal Tort Claims Act only allows money damages and not equitable relief, but otherwise affirmed the District Court decision. Birnbaum vs. McMillen, 588 F. 2d 318, 328 (2d Circ. 1978).

This express reason for the enactment of the Postal Matters exception, as stated by the Birnbaum District Court decision, to

> "shield(ing) the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year",

in no way justifies the interpretation and extension of the exception by the First Circuit, to bar the Petitioner's claim for a mishap which was totally avoidable, as it was the result of the Postal Service Employees' grossly negligent conduct of consciously storing cremated remains in a knowingly insecure location. The fate of the Petitioners' claim depended on the judicial circuit in which their loss was suffered. The Supreme Court should grant certiorari so that future claimants no longer face this unjust fate.

II. THE FIRST CIRCUIT'S INTERPRETATION OF THE POSTAL MATTERS EXCEPTION IS INCONSISTENT WITH CONGRESS'S INTENT AND DECISIONS OF THE UNITED STATES SUPREME COURT AND THE SECOND CIRCUIT.

The interpretation of the purpose of the Postal Matters Exception under 28 U.S.C. Section 2680(b) as protecting the United States from liability from "the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year" has logically resulted in the United States Supreme Court and the Circuit Courts determining that the exception bars only claims occasioned by no more than negligent conduct and which are not insurable. The First Circuit's far more expansive construction of the exception has resulted in its conclusion that the exception bars claims of 'loss' or 'miscarriage' resulting from intentional conduct regardless of whether the loss was insured.

A. There is a Conflict Concerning whether the Postal Service Exception is Limited To Loss Attributable to No Worse than Negligent Conduct.

In the case of Dolan vs. United States, 546 U.S. 481 (2006), the Supreme Court considered a claim arising from the negligent placement of the mail so as to cause a 'slip and fall' hazard by which a person tripped over mail left at one's home. The Court, in considering the meaning of the word 'transmission,' as used in the exception, stated,

> "If considered in isolation, the phrase 'negligent transmission' could embrace a wide range of negligent acts committed by the Postal Service in

the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination. ... The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purposes and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude that both context and precedent require a narrower reading, so that 'negligent transmission' does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. ...The phrase does not comprehend all negligence occurring the course of mail delivery..."

Dolan, at page 486.

The Court continued,

"Starting with context, the words 'negligent transmission' in Section 2680 (b) follow two other terms, "loss" and "miscarriage." Those terms, we think, limit the reach of 'transmission.' '(A) word is known by the company it keeps'- a rule that is 'often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress."....

Dolan, at page 486.

In concluding that "transmission" as used in the exception did not exclude loss resulting from a 'slip and fall' on a package allegedly negligently placed by a Postal delivery person, but only loss resulting from the occurrences such as the delay or loss of postal matter, the Court said,

> "Here, as both parties acknowledge, mail is 'lost' if it is destroyed or misplaced and 'miscarried' if it goes to the wrong address. Since both terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if 'negligent transmission' swept far more broadly to include injuries like those alleged here—injuries that happen to caused by postal employees but involve neither failure to transmit mail nor damage to its contents."
>
> Dolan, at page 487.

These statements were all directed to the issue before the Dolan Court, whether the postal matters exception barred a claim for loss resulting from the "slip and fall" over mail which Postal employee(s) had negligently placed so as to result in the fall. The rationale, however, is very pertinent as to whether "loss" or "miscarriage," as used in the exception, is limited to merely "negligent" conduct, or extends to grossly negligent or intentional conduct. The Supreme Court, in Dolan, specifically stated that "negligent transmission" does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. Dolan, at page 486. The "limit" of the conduct for which losses occasioned by the transmission of mail is therefore set at "negligence," and no more. As the Dolan Court stated that "a word is known by the company that it keeps," Dolan, at page 486, then it would be similarly incongruous if

the words "loss" or "misplaced" swept more broadly, so as to include grossly negligent or intentional conduct, than did the standard of conduct which applied to loss occasioned by, "transmission."

Previous to the Supreme Court decision in Dolan, the Second Circuit had concluded that the postal matters exception did not exclude losses from Postal Service Employees' actions which were intentional. Birnbaum vs. McMillen, 588 F. 2d 318, 328 (2d Circ. 1978).

However, the First Circuit, after the Dolan decision, but without citation to Dolan, ruled that even though the Postal Exception exclusion only limited loss occasioned by "negligent transmission," the exclusion's bar for "loss" or "miscarriage" was not so limited. The First Circuit therefore held that the exception barred claims for "loss" or "misplacement," even if resulting from intentional conduct or theft. LeVasseur vs. U.S. Postal Service, 543 F. 3d 23, 24 (1st Circ., 2008). This holding completely disregards the Dolan rationale, that a "word is known by the company that it keeps."

B. The First Circuit's Holding that the Exception Does Not Depend on the Availability of Insurance is at Odds with the Supreme Court and Other Circuits.

Previous to Dolan, the Second Circuit held that where the nature of the injury is such that the injured person could not protect himself by registering the parcel, the Postal Matters exception did not apply. Birnbaum vs. United States, 436 F. Supp. 967, 974 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978) and Raila vs. United States, 355 F. 3d 118, 122 (2d Circ. 2004).

The Dolan Court specifically stated that losses of the type for which sovereign immunity is retained under the

Postal Matters exception, Section 2680 (b), are at least some degree avoidable or compensable through postal registration and insurance. Dolan, at page 490.

Since Dolan, the First and the Ninth Circuits have disagreed on whether the Dolan Court expressly conditioned the Postal Matters exception to losses which were compensable by insurance. The Judgment of the First Circuit in the case at bar stated that the Supreme Court, in Dolan,

> "...does not affirmatively condition the application of the Postal Matters exception on the availability of insurance."

App., p. 3.

However, the Ninth Circuit did construe the Dolan Court holding as approving the Second Circuit's reasoning that, "...focused on whether the plaintiff could insure against the harm of which she complained.' MB Financial Group, Inc. vs. United States Postal Service, 545 F. 3d 814, 818 (9th Circ. 2008)

C. There is a Very Strong Showing of a Factual Basis for the Petitioners' Allegations.

The Petitioners' averments justify the inference that the actions of the United States Postal Service constituted "gross negligence" or "wanton or willful misconduct." The Petitioners' Complaint alleges, based on the statements of employees of the Wrentham Police Department to Mr. Ross, that the condition of the storage area had for some time been left insecure, and that one employee was not surprised by the loss of the articles. The Postal Department has declined to provide information concerning the causes of the loss, on the ground that the disclosure might "expose the Postal Department to additional loss." These allegations,

for pleading purposes, set forth claims in both "gross negligence" and "reckless conduct." "Reckless conduct" has been defined as, "When in the face of a known risk, one intentionally persists in conduct involving a high degree of probability that substantial harm might result to another," McConville vs. Massachusetts Bay Transportation Authority, 852 Fed. Supp. 1, 2 (D. Mass. 1994), quoting from Siver vs. Atlantic Union College, 338 Mass. 212, 216 , 154 N.E. 2d 360, 363 (1958), or

> " ...the state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. To be reckless, the conduct must be such as to evince a disregard of or indifference to consequences although no harm was intended. "
>
> In re. Sullivan, 238 B. R. 230, 237 (Bankr. D. Mass. 1999), cited in Rutanen vs. Baylis, 275 B.R. 145, 152 (Banrk. D. Mass. 2002).

In order to constitute gross negligence, the conduct of the Defendant must be characterized by a "high degree of culpability and indifference to duty" and is "substantially, and appreciably, higher in magnitude to ordinary negligence". McConville vs. Massachusetts Bay Transportation Authority, 852 Fed. Supp. 1, 3 (D. Mass. 1994, quoting from McGrath vs. G&P Thread Corporation, 353 Mass. 60, 62 , 228 N.E. 2d 450, 452 (1967) and Peck vs. Garfield, 862 F. 2d 1 (1st Circ. 1988), respectively.

In determining the sufficiency of the allegations of 'gross negligence' or 'wanton or willful misconduct,' the Court must also consider the refusal of the United States Post Office and Office of Inspector General to turn over all of its information. The Post Office has declined to

provide the entire explanation as to why it lost Eileen Simon's remains. The Courts of the Commonwealth of Massachusetts have, in certain circumstances, imposed on a party the burden to produce information in its own possession. See Knowles vs. Gilchrist, 362 Mass. 642; 652, 289 N.E. 2d 879, 885 (1972), William Rodman & Sons, Inc. vs. State Tax Commission, 373 Mass. 606; 611, 368 N.E. 2d 1382, 1385 (1997), and Meehan vs. Shaughnessy 404 Mass. 419; 441-448, 535 N.E. 2d 1255, 1167-1271 (1989), all of which stand for the principle that the party with greater access to the evidence has the burden to produce same. See also Wilson vs. Honeywell, 409 Mass. 803, 808; 569 N.E. 2d 1011, 1014 (1991). (res ipse loquitur – Defendant's failure to explain "adds weight" to inference of negligence).

Sadly, the Simons have not been provided critical information concerning the theft of their mother's cremated remains. As the Simons have alleged that the conduct of the Postal Employees was either "gross negligence" or "wanton or willful misconduct," the refusal of the Postal Department to provide information justifies, at this juncture, all inferences in favor of the Simons. The action should not be dismissed until the Postal Department provides all its information concerning how the cremated remains were stolen. Only then will the Simons fully know the level of culpability against which the applicability of the "Postal Matters exclusion" can be assessed.

CONCLUSION

The instant petition would help resolve the dichotomies concerning the interpretation of the "Postal Matters Exception." Essentially, at its very core, the allegations involve the Postal Employees' knowing registration of a box containing cremated remains. The

employees knew that the loss of such a package would result in emotional trauma to the deceased person's family against which trauma insurance could not be purchased. The employees nevertheless knowingly placed this box of cremated remains in an area they knew to be insecure, and the remains were stolen.

If the Court were to construe the Postal Matters exception as limited to

> "shield(ing) the Courts from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year", Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978),

then the Petitioner's case would not be barred. However, the First Circuit applies a standard as to which the "Postal Matters" exception absolves all actions of the Postal Employees, regardless of degree of negligence or even intent, and regardless of whether the resulting loss is insurable.

As the First Circuit has continued to so hold even after the Dolan decision, it is clear that the First Circuit will not reconsider its position unless there is a decision of the United States Supreme Court expressly ruling on these issues.

The Petitioner's application would provide the Supreme Court with the opportunity to expressly direct how the Circuit Courts are to apply the "Postal Matters" exception and resolve the disparities between the Circuits concerning its application.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No: 08-11841-WGY

SIMON

Plaintiff

v.

UNITED STATES

Defendant

ORDER OF DISMISSAL

YOUNG, D.J.

After a hearing held on 3/17/09, this Court Orders that the Defendant's Motion to Dismiss is Allowed and the above entitled action be and hereby is Dismissed

Sarah Thornton
Clerk
/s/ Elizabeth Smith
By: Deputy Clerk

March 18, 2009

Notice mailed to counsel of record.

United States Court of Appeals
For the First Circuit

No. 09-1412

PATRICIA SIMON, ET AL.,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

Before
Torruella, Lipez and Howard,
Circuit Judges.

JUDGMENT
Entered: September 11, 2009

The cremation ashes of the mother of appellants Patricia Simon and John Simon, deposited in the United States mail for delivery to a mortuary, were apparently stolen from an unsecure loading area of a post office. Appellants claimed under the Federal Tort Claims Act (FTCA). Their administrative claim was denied on the basis of the "postal matters exception" to the FTCA. 28 U.S.C. § 2680(b)("Any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter."). For the same reason, the district court dismissed their civil suit for failure to state a claim.

Appellants urge that the exception should not apply in their case, because they were denied the option of buying insurance for the shipment of the ashes,

and because the defendant's conduct was more than merely negligent, rising to the level of gross negligence. Neither contention is supported by the law. The allusion to insurance and registration in Dolan v. U.S. Postal Service, 546 U.S. 481, 490 (2006)("losses of the type for which immunity is retained under § 2680(b) are at least to some degree avoidable or compensable through postal registration and insurance") does not affirmatively condition the application of the postal matters exception on the availability of insurance. Appellants' gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere. Levasseur v. U.S. Postal Service, 543 F.3d 23 (1st Cir. 2008).

The judgment is **affirmed**.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:

Paul S. Hughes

Jennifer A. Serafyn